APPENDIX A — PETITION FOR REVIEW OF A DECISION OF THE BOARD OF IMMIGRATION APPEALS IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED OCTOBER 15, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-10827
Non-Argument Calendar

Agency No. A070-904-503

TERRY ADEDIRAN,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision
of the Board of Immigration Appeals

(October 15, 2010)

Before HULL, MARCUS and ANDERSON, Circuit Judges.

PER CURIAM:

Appendix A

Terry Adediran, a native and citizen of Nigeria, petitions for review of the Board of ImMigration Appeals' ("BIA") decision affirming the Immigration Judge's ("IJ") order denying her applications for asylum and cancellation of removal under the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1158, 1229b(b)(1). On appeal, Adediran argues that: (1) the IJ erred in denying her application for cancellation of removal based on an adverse credibility determination, and because the IJ failed to follow the correct legal standard as articulated in *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); and (2) the BIA erred in making an adverse credibility determination to deny her application for asylum because the IJ failed to consider testimony she gave at a prior merits hearing, and the BIA failed to acknowledge that she "cleared up" the inconsistencies cited by the IJ. After thorough review, we deny the petition in part, and dismiss it in part.

We review the BIA's decision only, except to the extent that it expressly adopts the IJ's opinion or reasoning. *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1284 (11th Cir. 2001). We review subject matter jurisdiction *de novo*. *Resendiz-Alcaraz v. U.S. Att'y Gen.*, 383 F.3d 1262, 1266 (11th Cir. 2004). The BIA's factual determinations, including credibility determinations, are reviewed under the substantial evidence test, and we "must affirm the . . . decision if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Ruiz v. U.S. Att'y Gen.*, 440 F.3d 1247, 1254-55 (11th Cir. 2006)(quotation omitted). A "finding of fact will be reversed only when

the record compels a reversal; the mere fact that the record may support a contrary conclusion is not enough to justify a reversal of the administrative findings." *Id.* at 1255 (quotation omitted).

First, we reject Adediran's claim that the IJ erred in denying her application for cancellation of removal. The Attorney General may cancel the removal of a nonpermanent resident who establishes, in part, that removal would cause "exceptional and extremely unusual hardship to the alien's . . . child, who is a citizen of the United States." 8 U.S.C. § 1229b(b)(1)(D). However, the INA provides that no court has jurisdiction to review "any judgment regarding the granting of relief under section . . . 1229b . . . of this title." 8 U.S.C. § 1252(a)(2)(B)(i). Nevertheless, we retain jurisdiction to consider constitutional claims or legal questions related to cancellation of removal. 8 U.S.C. § 1252(a)(2)(D); *Martinez v. U.S. Att'y Gen.*, 446 F.3d 1219, 1221-22 (11th Cir. 2006). But "[n]otwithstanding Congress's enactment of § 1252(a)(2)(D), we continue to lack jurisdiction over the BIA's purely discretionary decision that a petitioner did not meet § 1229b(b)(1)(D)'s 'exceptional and extremely unusual hardship' standard." *Martinez*, 446 F.3d at 1222-23. When examining a petition for review, we "must first consider whether we have subject matter jurisdiction to hear the petition at all." *Resendiz-Alcaraz*, 383 F.3d at 1266.

Contrary to Adediran's argument on appeal, the BIA did not deny her application for cancellation of removal based on an adverse credibility determination.

Rather, it concluded that Adediran failed to demonstrate that her children would face "exceptional and extremely unusual hardship." We therefore lack jurisdiction to review the BIA's purely discretionary decision that Adediran did not meet § 1229b(b)(1)(D)'s "exceptional and extremely unusual hardship" standard, despite being the sole financial support for her children.

We do have jurisdiction to review whether the IJ followed the correct legal standard in assessing her application for cancellation for removal. However, this argument is without merit because the IJ, in its decision, specifically applied *Recinas* to the facts in support of its conclusion, and the BIA affirmed that decision. Accordingly, we dismiss the petition in part as it relates to cancellation of removal, and deny the petition in part.

We also are unpersuaded by Adediran's argument that the BIA erred in making an adverse credibility determination to deny her application for asylum. "To establish asylum eligibility based on [religion] . . . the alien must, with credible evidence, establish (1) past persecution on account of her [religion] . . . , or (2) a 'well-founded fear' that her [religion] . . . will cause future persecution." *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1230-31 (11th Cir. 2005) (*quoting* 8 C.F.R. § 208.13(a), (b)).

The applicant bears the burden of proof in establishing her eligibility for asylum. *Id.* at 1230. The applicant may satisfy her burden solely through testimony that is "credible, direct, and specific," without

the need for corroboration. *Forgue v. U.S. Att'y Gen.*, 401 F.3d 1282, 1287 (11th Cir. 2005). "Conversely, an adverse credibility determination alone may be sufficient to support the denial of an asylum application." *Id.* "Once an adverse credibility finding is made, the burden is on the applicant alien to show that the [BIA]'s credibility decision was not supported by 'specific, cogent reasons' or was not based on substantial evidence." *Id.*

We may not review a final order of removal unless "the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. §1252(d)(1). If an alien has failed to exhaust her administrative remedies, we lack jurisdiction to consider the claim. *Amaya-Artunduaga v. U.S. Att'y Gen.*, 463 F.3d 1247, 1250 (11th Cir. 2006).

As an initial matter, Adediran failed to argue to the BIA that the IJ erred by not reviewing testimony she gave at a prior merits hearing when making its adverse credibility determination. Therefore, she failed to exhaust her administrative remedies and we lack jurisdiction to review this claim.

Moreover, the BIA's adverse credibility determination is supported by specific, cogent reasons. In particular, the BIA noted that (1) Adediran testified that one of her brothers was killed by Muslims, but only mentioned in her asylum application that her brothers were "feared dead"; (2) Adediran failed to disclose on her application that she was stabbed in the neck, the worst harm she ever experienced in Nigeria; and (3) Adediran testified

that a meeting of Christians was broken up by Muslims shooting guns, but later disavowed that claim by admitting that she saw no guns and heard no gunshots. The BIA specifically acknowledged Adediran's explanations for these inconsistencies, which consisted of either not knowing or not remembering any details. These explanations do not "clear up" any of the inconsistencies cited by the BIA. Therefore, the record does not compel reversal of the BIA's adverse credibility determination.

But even if the BIA erred, Adediran did not challenge the BIA's alternative finding that, even if credible, she failed to demonstrate that she suffered past persecution or that she has a well-founded fear of future persecution. Therefore, she has abandoned any claim of error as to the BIA's alternative, dispositive holding denying her application for asylum. *See Sepulveda*, 401 F.3d at 1228 n.2 (issues not raised on appeal are abandoned). Accordingly, we deny the petition for review with respect to this issue.

PETITION DISMISSED IN PART, DENIED IN PART.

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS DATED JANUARY 29, 2010

Decision of the Board of Immigration Appeals

Date: JAN 29 2010

In re: TERRY ADEDIRAN

IN REMOVAL PROCEEDINGS

APPEAL

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] Present without being admitted or paroled

APPLICATION: Asylum, withholding of removal, Convention Against Torture

The respondent, a native and citizen of Nigeria, appeals from an Immigration Judge's August 26, 2008, decision denying her applications for asylum under section 208 of the Immigration and Nationality Act, and for withholding of removal under section 241(b)(3) of the Act and pursuant to the Convention Against Torture. The respondent also appeals the denial of her application for cancellation of removal for nonpermanent residents under section 240A(b) of the Act. The appeal will be dismissed.

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We review an Immigration Judge's factual determinations, including credibility determinations, for clear error. *See United States v. National Assn. of Real Estate Boards*, 339U.S. 485, 495 (1950) (a factual finding is not "clearly erroneous" merely because there are two permissible views of the evidence). The Board reviews de novo questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges. *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

The respondent filed her application for asylum in 1993, and therefore the application is not subject to the statutory amendments enacted in the REAL ID Act of 2005 (Exh. 2). *See* section 101(h)(2) of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act of 2005, Div. B, Pub. L. No. 109-13, 119 Stat. 23 (codified in various sections of 8 U.S.C.) (provisions apply to asylum claims filed on or after May 11, 2005). The application for cancellation of removal was filed in July 2005 (Exh. 3).

As to the asylum application, the Immigration Judge entered an adverse credibility determination that is without clear error (I.J. at 4-7). Specifically, the Immigration Judge noted that the respondent indicated in her asylum application that because she and her family were Christians, several of her brothers had been taken away by Muslims and were "feared dead" (Exh. 2, I.J. at 6). During testimony, the respondent indicated, inconsistently, that one brother was klled in 1984 (Tr. at 156, I.J. at 6). As the Immigration Judge noted, "[t]he difference between a number of brothers being taken and held hostage and

one brother being killed are sufficiently striking that the Court would expect such inconsistencies to have been explained" (I.J. at 6). Similarly, the Immigration Judge found it inconsistent that the respondent would, on the one hand, testify that the worst harm that ever happened to her in Nigeria was that she was stabbed in the neck, but on the other hand, completely omit this information from the written asylum claim (*Id.*; *see also* Tr. at 175-80). The testimony was also internally inconsistent, since the respondent initially described a meeting of Christians being broken up by a group of Muslims shooting guns, but then disavowed this claim, admitting that she saw no guns and heard no gunshots (I.J. at 4-5; *see also* Tr. at 173-75; 190-92).

On appeal, the respondent does not specifically address these discrepancies. *See* Respondent's Brief at 2 (indicating that "the Respondent explained the reasons for the discrepancies cited by the Immigration Judge"). To the extent that the respondent argues that she adequately addressed the Immigration Judge's credibility concerns below, we note that when asked why she never included the neck-stabbing incident in her asylum application, she stated "I don't remember" (Tr. at 180). When asked about why she never included the incidents with guns, and instead described having rocks and stones thrown at her, the respondent stated "Maybe I did. I can't remember" (Tr. at 175). These are not explanations that would diminish the Immigration Judge's credibility concerns. *See also* Tr. at 184-86 (respondent's attempt to address inconsistency regarding death of brother).

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We also note that the respondent's claims are largely uncorroborated. For example, the claim that her mother was killed by religious extremists is contradicted by a death certificate showing the cause of death as liver cell carcinoma (Tr. at 181-82, Exh. 2). *See* I.J. at 8. As to this issue, the respondent admitted that the death certificate did not match her claims (Tr. at 183-84). Without credible testimony, the respondent is unable to satisfy the burden of proof applicable to asylum or the more stringent burden associated with withholding of removal. *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

Alternatively, the Immigration Judge found that the respondent had not demonstrated that she was the victim of harm rising to the level of persecution (I.J. at 8). While religious tensions exist in Nigeria, the Immigration Judge characterized the respondent's evidence as showing that she was, at most, "the victim of a one-time or occasional violence from the Muslims," which was not enough under these circumstances to demonstrate past persecution. *Id.*; *Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008). Given the fact that Christians apparently live freely and safely in some parts of Nigeria, the Immigration Judge also found that the respondent failed to demonstrate that she has a wellfounded fear of future persecution throughout the whole of Nigeria. *See* I.J. at 9-10. We affirm these alternative findings.

As to the respondent's application for relief pursuant to the Convention Against Torture, because the central evidence of any alleged torture of the respondent rested solely on her now-discredited testimony of past harm on account of her

Christian religion, the adverse credibility determination in this case necessarily precludes success on her claims for withholding of removal under the Convention Against Torture, since all claims for relief were predicated on the same facts. Separately, there is no evidence in the record that the respondent faces clear probability of torture at the instigation of, or with the consent or acquiescence of, current government officials or persons acting in an official capacity. 8 C.F.R. § 1208.18(a)(7).

We turn now to the respondent's application for cancellation of removal under section 240A(b) of the Act. We find it unnecessary to address the Immigration Judge's findings with regard to the respondent's lack of continuous physical presence and good moral character (I.J. at 12-13). *See* section 240A(b)(1)(A)-(B) of the Act. That is because we affirm the Immigration Judge's finding that the respondent has not demonstrated that her two United States citizen children would suffer exceptional and extremely unusual hardship if she is ordered removed to Nigeria.[1] See section 240A(b) of the Act.

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1. We note that the Immigration Judge found that the respondent's cancellation of removal application indicated that her children would not accompany her to Nigeria, but that she testified that her children would go with her if she is ordered removed to Nigeria (I.J. at 17). We assume for purposes of this appeal that the respondent would take her children with her to Nigeria.

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To establish "exceptional and extremely unusual hardship," an applicant for cancellation of removal under section 240A(b) of the Act must demonstrate that his or her lawful permanent resident or United States citizen spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the alien's deportation, but need not show that such hardship would be "unconscionable." *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). The Board has held that although many of the factors that were considered in assessing "extreme hardship" in suspension of deportation cases should also be considered in evaluating "exceptional and extremely unusual hardship," an applicant for cancellation of removal must demonstrate hardship beyond that which has historically been required in suspension of deportation cases involving the "extreme hardship" standard. *Id.*; *cf. Matter of O-J-O-*, 21 I&N Dec. 381 (BIA 1996); *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978). In establishing eligibility for cancellation of removal, only hardship to qualifying relatives, not to the applicant himself or herself, may be considered, and hardship factors relating to the applicant may be considered only insofar as they might affect the hardship to a qualifying relative. *Matter of Monreal, supra*. Moreover, among the factors to be considered in assessing hardship to a cancellation applicant's children are poor economic conditions and diminished educational opportunities in the country of removal and whether the applicant has family members in that country to assist in his or her adjustment upon return. *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002).

Here, the respondent's two children were aged fourteen and ten at the time of the hearing below (Tr. at 151). They are healthy and doing well in school (Tr. at 139, 158-59). The respondent admitted that she really did not know what to expect for her children if they

were to relocate to Nigeria with her (Tr. at 158). The respondent expressed concern that her ability to earn money would diminish and she questioned her ability to support her family (Tr. at 159). The primary language spoken in Nigeria is English, and the respondent agreed that her children would be able to communicate in Nigeria (Tr. at 201). The respondent has experience working as a nurse and has a computer degree (Tr. at 204). She owns a car outright and owns a home on which she is paying a mortgage (Tr. at 203). Although the respondent expressed concern over the high price of goods in Nigeria, she had little objective evidence to support these concerns (Tr. at 202-03).

As the Immigration Judge noted, "the hardship to the children adjusting to a different culture, adjusting to a lesser economic standard, and possibly a lesser educational standard would not either singly or cumulatively rise to the exceptional and extremely unusual hardship standard." I.J. at 18. We affirm the Immigration Judge's finding that given the children's good health and ability to communicate in the country of removal and the respondent's professional skill and education, the requisite level of hardship to her qualifying relatives had not been shown.

Finally, given the Immigration Judge's finding that (1) the respondent was evasive and (2) she failed to file income taxes in the United States until she decided to file for cancellation of removal and even then, improperly claimed a credit that was reserved for citizens and lawful permanent residents of the United States, we decline to disturb the Immigration Judge's decision to deny

the relief of voluntary departure in the exercise of discretion. I.J. at 19-20.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

s/
FOR THE BOARD